THE STATUTE OF LIMITATIONS AND THE CONFLICT OF LAWS

The rule of Anglo-American law that the ordinary statute of limitations is procedural in character and is determined therefore in the conflict of laws exclusively by the law of the forum, is so firmly established that we are apt to regard it as the universal rule. Such a conclusion, however, would be very far from the truth. There is perhaps no problem in the conflict of laws with respect to which the courts and writers of the different countries of the world are more strongly divided. In the light of this fact a decision of the Court of Appeals of Milan of March 23, 1916, is of especial interest. *Sala v. Model*, 2 *Rivista di diritto commerciale*, 1916, 896.[1] Action was brought for the breach of a contract which had been entered into in England. The action was barred under the Italian statute of limitations but not under the English statute. The court held that the English statute must yield on grounds of policy to the Italian statute.

There are two principal systems with reference to the general question—the Anglo-American and the continental. The former looks at the question fundamentally as one of procedure;[2] the latter as one affecting the substantive rights of the parties. The Anglo-American rule follows the rule laid down by the Dutch writers on the conflict of laws of the seventeenth century.[3] The continental rule, on the other hand, represents the older and more general[4] view. The Anglo-American rule is simple and leads always to the application of the law of the forum; the question is only, whether it brings about just results. Under the continental view, on the other hand, the problem arises at the outset whether the rules determining the statute of limitations in the conflict of laws should be the same as the rule governing

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[1] The court rested its decision on Art. 12 of the Preliminary Dispositions of the Civil Code, which provides that the foreign legislation shall not be applied in the face of laws touching in any respect the public policy of the forum.

[2] *LeRoy v. Crowninshield* (1820, C. C. Mass.) 2 Mason, 151, Fed. Cas. No. 8269; *M'Elmoyle v. Cohen* (1839, U. S.) 13 Pet. 312; *Townsend v. Jemison* (1850, U. S.) 9 How. 407. See also 48 L. R. A. 625, 6 L. R. A. (N. S.) 658; (1918) 27 YALE LAW JOURNAL, 1078; Dicey, *Conflict of Laws* (2d ed.), rule 193; Minor, *Conflict of Laws*, 522; Story, *Conflict of Laws* (8th ed.), 793; Westlake, *Private International Law* (5th ed.), 328; Wharton, *Conflict of Laws* (3d ed.), 1244-1245.

The law of the forum applies though the parties lived in the foreign jurisdiction until the statute had taken effect. *Thompson v. Reed* (1883) 75 Me. 404; *Bulger v. Roche* (1831, Mass.) 11 Pick. 36; *Power v. Hathaway* (1864, N. Y. Sup. Ct.) 43 Barb. 214.

[3] Paul Voet was the first to break with the traditional view. *Ad statutis*, s. 10, n. 1. He was followed by Huber (*Praelectiones juris civilis*, pt. 2, bk. 1, tit. 3, n. 7) and by John Voet (*Ad Pandektas*, bk. 44, tit. 3, n. 12).

[4] *Bartolus and the Conflict of Laws* (Beale's translation) No. 19. Bartolus applied in the matter of contracts the law of the place of performance. *Ibid.* see also Michel, *La prescription libératoire en droit international privé*, 26 ff.

the substantive rights of the parties in general or whether a special rule should apply. If the former viewpoint is the correct one, different results will be obtained in the different countries corresponding to the differences in the rules adopted by them in the conflict of laws, with reference to the substantive rights of the parties. In the matter of contracts there is the greatest variety of view in this regard.

As regards the limitation of actions arising out of contracts, the Belgian courts say that the law of the domicile of the debtor controls.[5] The French courts have been in the habit of expressing it in the same manner.[6] In these cases the *lex domicilii* coincided, however, generally either with the *lex loci contractus* or with the *lex fori*. Most of the French courts expressly adopt the law of the place of contracting.[7] Some accept the law of the place of performance as the governing law.[8] A considerable number, even, support the law of the forum.[9] The Italian courts have consistently held that the statute of limitations is controlled by the law applicable to the substance and effect of the contract.[10] Contracts falling within the provisions of the Civil Code are controlled therefore by Article 9 of the Preliminary Dispositions of the Civil Code,[11] and commercial contracts by Article 58 of the

[5] Trib. com. Ostend, March 8, 1888, Pandectes belges, 1888, 1081. A stipulation that a foreign law should control was deemed opposed to public policy where the place of performance was in Belgium. Trib. com. Antwerp, May 30, 1862, Jurisprudence du port d'Anvers, 1862, 1, 373.

[6] Cass. Jan. 13, 1869, D. 69, 1, 135; Trib. Seine, Nov. 28, 1891, Clunet, 1892, p. 712.

[7] App. Alger, Aug. 18, 1848, S. 49, 2, 64; App. Chambéry, Feb. 12, 1869, S. 1870, 2, 9; Trib. com. Marseilles, Oct. 25, 1880, 8 Clunet, 259; App. Bordeaux, March 1, 1889, D. 1890, 2, 89; Apr. 27, 1891, 19 Clunet, 1004; Trib. civ. Seine, Nov. 14, 1890, 19 Clunet, 987; Apr. 30, 1904, 34 Clunet, 417; Trib. de Tunis, June 15, 1891, 18 Clunet, 1238; Dec. 26, 1898, 25 Clunet, 557; Trib. civ. Marseilles, Oct. 31, 1906, 34 Clunet, 416.

[8] App. Paris, March 29, 1836, Journal du Palais, 1835-1836 (3d ed.) 1206; S. 1836, 2, 457; Trib. com. de la Seine, Aug. 3, 1838, affirmed by the court of Paris Feb. 7, 1839, Journal du Palais, 1839, 1, 298; Trib. com. Marseilles, Dec. 20, 1865, App. Aix, June 20, 1866, Journal de jurisprudence commerciale et maritime, 1866, 1, 36; 1867, 1, 116; App. Bordeaux, Dec. 26, 1876, S. 1877, 2, 108; Trib. civ. Seine, Feb. 19, 1889, 16 Clunet, 621.

[9] Cass. Jan. 13, 1869, D. 1869, 1, 135; App. Besançon, Jan. 11, 1882, D. 1882, 2, 211; Trib. civ. Seine, Nov. 28, 1891, 19 Clunet, 712; Dec. 11, 1893, 21 Clunet, 145; App. Rennes, May 20, 1899, 26 Clunet, 998; App. Paris, Nov. 15, 1906, 3 Darras, 756.

[10] Encyclopedie, Art. 9, Preliminary Dispositions, No. 174.

[11] Art. 9 of the Preliminary Dispositions of the Civil Code provides as follows: "The substance and effect of obligations are deemed to be regulated by the law of the place in which the acts were done, and, if the contracting parties are foreigners and belong to the same nationality, by their national law. The showing of a different intent is reserved in each case." This article applies also where the contract was entered into abroad between an Italian and a foreigner. Encyclopedie, Art. 9, Preliminary Dispositions, No. 173; Cass. Turin, June 30, 1882, Cass. Tor. 1882, 2, 215.

Commercial Code.[12] But whether the foreign statute of limitations would be enforced where the action would have been barred by the statute of limitations of the forum had apparently not been presented to the Italian courts before the case of *Sala v. Model, supra.*[13]

The fundamental rule of Anglo-American law which applies the law of the forum as regards the limitation of actions, controls only where the foreign statute bars the action and does not discharge the obligation of the contract. Where the law of the state governing the substance of the contract has *discharged the obligation* of such contract as a result of the running of the statute of limitations, instead of merely barring the remedy, it is recognized in both England and the United States that no action will lie, although the suit would not have been barred under the local statute of limitations of the forum.[14] This is especially true in the United States where a statute creating a cause of action specifies the time within which such action must be brought. Such a provision is regarded as constituting a condition upon which the cause of action is granted and is controlled therefore by the law governing the substantive rights of the parties.[15]

In a good many of our states the common law rule that the statute of limitations is subject to the law of the forum has been changed by statutes, which under certain conditions close the doors of the courts of the forum with respect to foreign causes of action where the action is barred by such foreign law.[16]

The Italian decision referred to above reaches a result similar to

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[12] Art. 58 of the Commercial Code provides as follows: "The form and essential requisites of commercial obligations, the form of the acts that are necessary for the exercise and preservation of the rights arising from such obligations or from their performance, and the effect of the acts themselves, are governed, respectively, by the laws and usages of the place where the obligations are created and where said acts are done or performed, save in every case the exception laid down in article 9 of the Preliminary Dispositions of the Civil Code with respect to those subject to the same national law." To the effect that the domicile of the debtor controls see Trib. of Rome, Dec. 30, 1871, La Legge 1872, 1, 156; App. Florence June 16, 1873, Annali, 1873, 2, 474.

[13] In Germany the law of the place of performance governs the obligation of contracts and is applied also with reference to the statute of limitations. Reichsgericht, May 18, 1880, 2 RG 13; Jan. 17, 1882, 6 RG 24.

Art. 52 of the Convention on International Commercial Law concluded at the Congress of Montevideo provides that "the prescription of personal actions is governed by the law to which the corresponding obligations are subject."

[14] *Don v. Lippmann* (1837, H. L.) 5 Cl. & F. 1; *Huber v. Steiner* (1835, C. P.) 2 Bing. N. Cas. 202; *Canadian Pac. R. Co. v. Johnston* (1894, C. C. A. 2d) 61 Fed. 738. See also Dicey, 710; Minor, 523; Story, 804; Westlake, 330; Wharton, 1256.

[15] See *The Harrisburg* (1886) 119 U. S. 199; *Davis v. Mills* (1904) 194 U. S. 451. See also 46 L. R. A. (N. S.) 687, note.

[16] See notes in 48 L. R. A. 639; 4 L. R. A. (N. S.) 1029; 51 L. R. A. (N. S.) 96, L. R. A. 1915C, 976; (1918) 27 YALE LAW JOURNAL, 1078.

the one produced by the statutes just mentioned. But for the fact that most of the American statutes contain various qualifications of the principle adopted by them, the result would be identical.

What is the true solution of the problem? That the law of the forum is free to apply either its own statute of limitations or the statute of the foreign state there can be, of course, no doubt. Whether it will apply the one or the other depends solely upon its own notion of what is right and proper. One of two viewpoints may be adopted. The question may be looked at in the first place from the viewpoint of the internal or uniterritorial law of the forum. This would lead in England and the United States to the application of the statute of limitations of the forum. Inasmuch as the ordinary statutes of limitation are regarded in this country for purposes of constitutional law, statutory construction, etc., generally speaking, as relating to the remedy and not to the obligation of the contract, the conclusion would be that the question must in the conflict of laws also be governed by the law of the forum, in accordance with the rule universally recognized that the *lex fori* controls the remedy.[17] Logically the statute of limitations of the forum would govern without reference to whether the statute of the place governing the obligation of the contract was of a shorter or longer duration, or whether the foreign law regarded its statute of limitations as substantive or procedural. Most of the continental courts, on the other hand, would be forced to a different conclusion, because of the fact that "prescription of actions" is regarded by their law as affecting the substance of the obligation.[18]

The second viewpoint may be called, in the language of the Supreme Court of the United States, the "international" point of view. In this case the reasoning would take the following form: As the contract was made in a foreign country it is just and wise to attach the same legal consequences to the operative facts as is done in such foreign state by its uniterritorial law. The same policy which dictates the incorporation of the foreign law of contracts suggests that the foreign statute of limitations be incorporated likewise. This rule is preferable to the doctrine which declines to incorporate foreign statutes of limitations, because it leads internationally to greater uniformity.

That this second mode of reasoning is more satisfactory than the

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[17] Where the foreign statute of limitations operates as a discharge of the contract no action will upon principle be allowed anywhere.

[18] Concerning the nature of prescription from the viewpoint of international law, see Baudry-Lacantinerie & Tissier, *De la prescription* (3d ed.) 90-91; Sahm, *Die aussergerichtliche Geltendmachung der Verjährungseinrede.* 49 Jherings Jahrbücher, 59 ff.; Treutler, *Die Verjährungseinrede im internationalen Privatrecht, nach heutigem Reichsrecht,* 9 ff.

first would seem to be clear, although it is opposed to the view taken by our own law. The Anglo-American doctrine admits of an easy historical explanation. When the question of the conflict of laws was first presented to English courts towards the middle of the eighteenth century, the common law had developed for centuries without foreign influence. It was most natural, therefore, that the courts should be inclined to restrict the operation of foreign law and look upon the statute of limitations in the conflict of laws as they were wont to do in their uniterritorial law—as affecting the remedy—especially since they could find warrant for so doing in the writings of the Dutch jurists. In regard to penal laws the same narrow attitude was originally taken by the English and American courts. Whenever a statute was penal in the municipal sense it was so regarded in the conflict of laws. Both the Privy Council[19] and the Supreme Court of the United States,[20] however, realized in the end that a broader viewpoint should be taken in the conflict of laws, and that the law of the forum should decline to enforce such foreign laws only if they are penal in the strict or international sense.

There is no reason, as regards statutes of limitation, either, why the internal test, which classifies them as procedural or as relating to the remedy, should be carried over into the conflict of laws. A right which can be enforced no longer by an action at law is shorn of its most valuable attribute. After the enforcement of the right of action is gone under the law governing the rights of the parties, it would seem clear upon principle that the same consequences should attach to the operative facts everywhere. Nor is there any policy pointing to a different conclusion.[21] It follows that no court should

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[19] *Huntington v. Attrill* (P. C.) [1893] A. C. 150.

[20] *Huntington v. Attrill* (1892) 146 U. S. 657.

[21] Most of the foreign authors support the view that the law governing the obligation of the contract should control also the time within which an action on the contract is barred. Asser, *Eléments de droit international privé*, 84-85; Audinet, *Principes élémentaires du droit international privé* (2d ed.) 621; Cavaretta, *La prescrizioni nel diritto internazionale privato*, 105-107; Despagnet, *Précis de droit international privé* (5th ed.) 999; 3 Diena, *Trattato di diritto commerciale internazionale*, 218, 223; Fedozzi, *Il diritto processuale civile internazionale*, 539; 2 Jitta, *La substance des obligations*, 165; 8 Laurent, *Le droit civil international*, 360-361; 4 Lyon-Caen & Renault, *Traité de droit commercial* (4th ed.) 571; 2 Meili, *Das internationale Civil- und Handelsrecht*, 356; Ottolenghi, *La cambiale nel diritto internazionale*, 487, 495; Savigny, *A treatise on the conflict of laws* (2d ed.) 201; Schäffner, *Entwickelung des internationalen Privatrechts*, 111; Villalbi, *Tratado de derecho mercantil internacional*, 422; Vincent & Penaud, *Effets de commerce*, No. 114; Wächter, *Archiv für die civilistische Praxis*, 411; 4 Weiss, *Traité de droit international privé* (2d ed.) 406-407, 463.

A few apply the law of the domicile of the debtor. Surville & Arthuys, *Cours élémentaire de droit international privé* (6th ed.) 937; 1 Vareilles-Sommières, *Synthèse de droit international privé*, 255.

The following authors prefer the law of the forum: Chrétien, *Etude sur la*

enforce a foreign cause of action which is barred by the law governing the substantive rights of the parties. The fact that either the internal law of the forum or the internal law of the foreign state or the internal law of both states may regard statutes of limitation as relating to the remedy is therefore immaterial. What attitude the foreign law may take in the conflict of laws with reference to statutes of limitation of other countries is likewise of no consequence, for the law of the forum should not upon correct principle incorporate the rules of the conflict of laws of another state.[22]

Does it follow of necessity that the foreign statute of limitations must also be incorporated where the statute of the forum is the shorter in duration of the two? In the ordinary language of the courts the answer would be "yes, unless the enforcement of the foreign statute is contrary to the public policy of the forum." Upon a more correct analysis of the real situation this statement means that the law of the forum may properly decline to incorporate the foreign statute of limitations, that is, attach identical consequences to the operative facts as are attached thereto by the foreign law, if some paramount interest of the forum would be injured thereby. Can it be said that the statute of limitations of the forum affects such an interest? Suppose that the foreign law had no statute of limitations at all or, what is more likely to be true in fact, that the period prescribed by the foreign law is 20 or 30 years, while that of the forum is 6 years, should the courts of the forum enforce the foreign cause of action after the expiration of 6 years from the time the action accrued? A proper appreciation of the situation would suggest a negative answer. The question affects not merely the parties to the litigation but the interests of the state as a whole. It relates directly to the administration of justice in the state.[23] A limitation of the

lettre de change, 207; Labbé, S. 1869, 1, 49; Martin, *La prescription libératoire en droit international privé*, 19 *Revue de droit international et de législation comparée*, 279; Mittermaier, *Ueber die Collision der Processgesetze*, 13 *Archiv für civilistische Praxis*, 307.

Massé favors the law of the place of payment. 1 Massé, *Le droit commercial dans ses rapports avec le droit des gens et le droit civil*, No. 599.

[22] See (1910) 10 COL. L. REV. 327, 344; (1918) 27 YALE LAW JOURNAL, 509.

[23] The same view is held by a considerable number of writers. Aubry, 23 Clunet, 479; 1 Aubry & Rau, *Cours de droit civil français* (5th ed.) 165-166; Audinet, *Principes élémentaires du droit international privé* (2d ed.) 621; Baudry-Lacantinerie & Tissier, *Traité de la prescription*, Nos. 982, 985; Despagnet, *Précis de droit international privé* (5th ed.) 999; Valery, *Manuel de droit international privé*, 1014-15; 4 Weiss, *Traité de droit international privé* (2d ed.) 407. According to Pillet the statute of limitations exists for the protection of the debtor, whose national law therefore should control. He would apply the statute of the forum, however, whenever it is of a shorter duration than the statute of limitations of the national law of the debtor. *Principes de droit international privé*, p. 457, note.

In *LeRoy v. Crowninshield* (1820, C. C. Mass.) 2 Mason, 151, Fed. Cas. No.

time within which suit must be brought rests upon the impossibility of determining a case justly after the lapse of a long period since the time when the facts occurred. Because of the fallibility of human memory and the impracticability of preserving all written evidence concerning business transactions for an indefinite period of time, the law fixes a period which it deems reasonable under the conditions as they exist in the particular state or country. The length of the period granted is intimately connected with the system of procedure prevailing at the forum. For example, a state in which the procedure is oral will, in the nature of things, prescribe a shorter statute of limitations than a state which requires the facts to be established by written evidence. The period prescribed by the statute of limitations itself defines the maximum time within which, in the estimation of the legislature of that state, substantial justice can be done in the particular case under the conditions surrounding the trial of such a case. This being the reason for the adoption of statutes of limitation, it follows as a matter of course that the maximum period prescribed must apply to all causes of action, irrespective of the place where they may have arisen. The result reached by the Italian court of appeal is therefore to be approved.

E. G. L.

8269, Story intimated that on principle no action should be allowed if all remedies were barred by the *lex loci contractus,* but he appears to have changed his view later. See *Townsend v. Jemison* (1850, U. S.) 9 How. 407; Story, *Conflict of Laws* (8th ed.), 793.